No. 95-962 (A)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CSX TRANSPORTATION COMPANY and
MONROE COUNTY, INDIANA,

Petitioners,

vs.

FRITSCH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

CHARLES H. MONTANGE
Counsel of Record
Attorney for Petitioner
Monroe County, Indiana
426 N.W. 162nd Street
Seattle, Washington 98177
(206) 546-1936

CHARLES M. ROSENBERGER
Counsel of Record
Attorney for Petitioner
CSX Transportation Company
CSX Transportation, Inc.
500 Water Street, J150
Jacksonville, Florida 32202
(904) 359-3100

Of Counsel:

WILLIAM STEGER
Monroe County Attorneys
Courthouse, Room 220
Bloomington, Indiana 47404

8129
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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Petitioners CSX Transportation, Inc. and Monroe County, Indiana, reiterate their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

FURTHER REASONS FOR GRANTING THE WRIT

1. Appellate jurisdiction under *Brotherhood of Locomotive Engineers*. The first issue in this case is whether the Court of Appeals had jurisdiction to review the decision of the Interstate Commerce Commission below. The ICC decision refused to reopen an administratively final decision. Under *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 622 (1984), no review was possible. ICC's successor (the Surface Transportation Board) and the United States categorically state that the lower court erred in finding jurisdiction. Respondents Fritsch, *et al.*, do not even attempt to support the rationale employed by the lower court in support of its jurisdiction. Respondents Fritsch, *et al.*, instead assert that Monroe County raised new information (namely, the condition of the corridor). This is absurd. Monroe County reiterated to the ICC exactly what we (and CSX) said to the ICC when we requested ICC to issue the Notice of Interim Trail Use (NITU) in the first instance. As the Federal Respondents state in their Brief, there was no "new information" justifying judicial review here.

2. ICC jurisdiction to railbank. The second issue is whether ICC retained jurisdiction to railbank the corridor by reason of a public use condition imposed pursuant to 49 U.S.C. § 10906. CSX and Monroe County agree with the Federal Respondents that the lower court clearly erred on this issue as well.

3. Significance for certiorari. The federal Respondents basically contend that the lower court's ruling was so

aberrational and contrary to law that it will hopefully be ignored. This is more an argument for summary reversal than for declining to review the decision. There is no question but that the court below has opened a gaping hole in the finality of federal agency decisions, essentially eviscerating *ICC v. Brotherhood of Locomotive Engineers, supra.*

Monroe County has made a substantial investment in the corridor and an even greater investment in planning a trail on the corridor. The erroneous lower court decision unquestionably jeopardizes a $1.2 million grant, over $200,000 in funds for engineering and related work already completed, plus equivalent funds for other expenses and overheads.

Law is supposed to lead to dependable results; like cases are to be treated alike; precedent and long standing agency practice are to be accorded respect and weight. Law is not supposed to be the whim of a particular panel on a particular day. It is not for the courts to "preempt congressional action by judicial decree[] . . ." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978).

It is difficult to comprehend the federal Respondents' view that a decision which is so obviously contrary to applicable precedent and which is obviously wrong on all issues is nonetheless not appropriate for review. This is especially so when its results are so unfair and upsetting to expectations of the parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES H. MONTANGE
Counsel of Record
Attorney for Petitioner
Monroe County
426 N.W. 162nd Street
Seattle, Washington 98177
(206) 546-1936

CHARLES M. ROSENBERGER
Counsel of Record
Attorney for Petitioner
CSX Transportation Inc.
500 Water Street, J150
Jacksonville, Florida 32202
(904) 359-3100

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WILLIAM STEGER
Monroe County Attorneys
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